NO. 10930

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

EIVIND ANDERSON and CONTINENTAL CASUALTY COMPANY, a corporation.

Appellants,

vs.

UNITED STATES OF AMERICA for the use and benefit of A. G. RUSHLIGHT & CO., a corporation and THE FIRST NATIONAL BANK OF PORTLAND, OREGON, a National Banking Corporation, and W. L. REID doing business as W. L. REID COMPANY.

Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

CHARLES H. LEAVY, *District Judge*

BRIEF OF APPELLANTS

DUPUIS & FERGUSON
Attorneys for Appellants

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FRAYN PRINTING COMPANY

FILED

APR 1 0 1945

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JURISDICTION

This is an action brought by a resident of the State of Oregon against a resident of the State of Washington under a written sub-contract for the installation of certain plumbing and heating work at Fort Lewis,

Washington. That the District Court of the Western District of Washington, Southern Division, had jurisdiction by virtue of the residence of the appellant within said District and by virtue of Title 28 U. S. C. A., Section 41, Sub-section 1 (b). That the Circuit Court of Appeals for the Ninth Circuit has jurisdiction of said cause by virtue of Title 28 U. S. C. A., Section 225, Sub-section (a), Paragraph "First."

STATEMENT OF THE CASE

The appellant, Eivind Anderson, is a resident of Tacoma, Washington, and for many years prior to the year 1941 was engaged in the construction business as a general contractor. The appellant, Continental Casualty Co., a corporation, is engaged in the writing of surety bonds and was the surety of appellant, Eivind Anderson, on a bond executed in connection with the contract out of which this controversy arose. Since the liability of appellant Continental Casualty Co. stands or falls on that relationship and since it asserts no separate or independent defense, its argument will be submitted jointly with appellant Eivind Anderson, and for the sake of simplicity the appellant Eivind Anderson will be called "the appellant" herein.

The appellee, A. G. Rushlight & Co. is a corporation with its principal place of business at Portland, Ore-

gon, and for many years prior to 1941 was engaged in the construction business as a plumbing and heating sub-contractor. The appellee, First National Bank of Portland, Oregon, is a national banking corporation and is the assignee of the claim here in controversy. Since the parties to the actual dispute are the appellant and A. G. Rushlight & Co., the latter will be referred to as "the appellee."

This dispute arose out of a plumbing and heating sub-contract between appellant and appellee. Pls. Ex. 7, Tr. 71.

In the trial court there were many items in controversy. However this appeal is limited to only one item, an alleged extra for revision of a central heating plant in the sum of $12,118.47, the remaining items having been previously disposed of. Tr 27.

In response to a call for bids by the War Department, the appellant on April 8, 1941, submitted a proposal to construct a 400 bed hospital and 36 miscellaneous buildings at Fort Lewis, Washington, for the sum of $936,517.00. Among other things included in this project was a central steam producing heating plant known as Type HBH-13, equipped with 3 low pressure boilers. Tr. 50, 59, Pl's. Ex. 3, Tr. 245, 246.

Although the bids were opened on April 8, 1941, and

appellant was found to be the low bidder, the contract was not immediately awarded. Instead on April 26, 1941, the Contracting Officer for the War Department requested the appellant to make a supplementary bid by deleting the heating plant Type HBH-13 and substituting therefore, heating plant Type HBH-16 equipped with 2 Erie City high pressure steam boilers, and certain other boiler room construction changes not in controversy here. Tr. 59, Pl's. Ex. 3.

On May 6, 1941, a supplementary proposal in the sum of $23,142.00 was submitted by appellant to the Contracting Officer in addition to the amount previously bid on April 8, 1941. On receipt of the supplementary proposal the Contracting Officer on May 6, 1941, awarded the contract to appellant as revised by the supplementary proposal and ordered the work to commence. Tr. 64, Pl's. Ex. 5, Tr. 67, Pl's. Ex. 6.

The appellee was informed of the bid opening on April 8, 1941, and said bid opening was attended by W. A. Rushlight, the president of appellee. Subsequent to the bid opening the officers of appellee were in almost constant contact with appellant seeking a subcontract on the plumbing and heating work, and also were in close contact with the Contracting Officer. Tr. 118, 123-125, 169, 241.

As a result of these contacts appellee was informed of the change in the type of heating plant and on April 30, 1941, offered appellant an estimate of the additional cost arising from this change. Tr. 130, Pl's Ex. 4.

On May 6, 1941, W. A. Rushlight accompanied appellant to Fort Lewis to submit the supplementary proposal and was present when the contracting officer awarded the contract and accepted the revised type of heating plant on that day. Tr. 384, 250.

There is a dispute as to what occurred on the return trip from Fort Lewis to Tacoma. The appellant testified that while driving from Fort Lewis to Tacoma on May 6th he and W. A. Rushlight agreed that appellee was to have a sub-contract for all the plumbing, heating and mechanical work under the contract as revised for the sum of $293,000.00 and that appellee was to submit a proposal in writing to that effect. Tr. 250-252.

However, upon his return from Fort Lewis, W. A. Rushlight talked with Charles Crawford Wyatt, a sales representative of the Roy T. Early Co. in Tacoma. In this conversation Mr. Rushlight informed Mr. Wyatt that the boiler revisions were approved and placed an order for the revised type boilers. This order was effected by writing and delivering to Mr. Wyatt a memorandum reading as follows:

"You are hereby authorized to place order for 2 Erie City Boilers complete with all trim and accessories as specified and as per your letter of April 29, 1941. Formal order will be signed by Eivind Anderson for our acct. for the sum of $16,924.00.

"Boiler to be delivered and erected for above price.

A. G. Rushlight & Co.

W. A. Rushlight, Pres."

Tr. 207-210, Pl's Ex. 17.

It is uncontradicted that the purpose of having the order signed by appellant was to avoid Wyatt's making a sale to a Portland firm which was outside his sales territory. The result of the memo and a simultaneous phone call from W. A. Rushlight to appellant making a similar request was that appellant executed a written order to the Roy T. Early Co. for the revised boilers on May 7, 1941. Tr. 211, 213, Pl's. Ex. 17.

On May 9, 1941, appellee submitted its written proposal to subcontract the plumbing, heating and mechanical work for the sum of $293,000.00. This proposal was typewritten but was interlined in ink in two places. The first interlineation changed the date from April 3, 1941, to May 9, 1941. The second added the word "Revised" near the top. The price was written in longhand in a place left for that purpose but there was no change made in the figures. The proposal was

signed by W. A. Rushlight as president of appellee. Tr. 85, Pl's Ex. 8.

There is a sharp dispute in the testimony as to what occurred at the meeting when the bid was submitted by appellee. Appellant and his son Arthur Anderson testified that the proposal was all written and signed when presented; that the only change made was the change in dates; that there was no discussion as to prices; and that the only discussion was whether or not appellee would furnish a subcontractor's surety bond at a cost of approximately $3000.00. W. A. Rushlight testified that there was considerable discussion of price and that the $293,000.00 price was filled in after the discussion. Carl C. Hall, attorney and secretary of appellee, testified that price was discussed but that he did not see the price filled in at the meeting. Clyde Philp testified that price and surety bonds were both discussed but that he did not see the price filled in. Tr. 254, 255, 221, 222, 201, 202, 444, 447.

On the day following the proposal was accepted by letter upon condition that a surety bond be furnished by appellee. Tr. 90, 91, Pl's Ex. 9.

A surety bond was furnished and the formal subcontract was executed on May 15, 1941, Pl's. Ex. 7, Tr. 71-84.

Although the sub-contract as written required the appellee to make a boiler installation, no specific reference is made to the revision in type of boilers. However, the fact that the revision had been made was known to both parties at the time the sub-contract was executed, and the proposal for the sub-contract was made. Tr. 384, 248, 250, Ex. 7.

The revised type boilers were installed by the Roy T. Early Co. under its contract with appellant and this claim was made by appellee for an extra under its contract. Tr. 253, 132, 141, 142.

No claim for an extra was made by appellee as required by the sub-contract but appellee did unsuccessfully attempt to obtain appellant's signature to an agreement to allow it an extra for this item. Tr. 258, 259, 510, 511.

STATEMENT OF QUESTIONS INVOLVED

1. Is a subcontractor entitled to an extra for installing a heating plant according to revised plans and specifications, where the revision was made prior to the date of the subcontract, was known to all the parties, and the subcontractor had agreed in writing that a third person would make the installation and that the cost thereof was to be deducted from his contract price prior to the execution of the subcontract?

Court's answer: Yes.

2. Where the subcontract provides that the subcontractor, agrees—

> "To make all claims for extras of every kind and nature in writing within one week from the date that said claimed extra is incurred."

is the subcontractor entitled to recover for an alleged extra, when no claim was filed at any time and there was no evidence of a waiver of this provision?

Court's answer: Yes.

3. Are the Findings of Facts supported by the evidence where the appellee's president, and principal witness, is contradicted by disinterested as well as interested witnesses, and by the ordinary interpretation of the surrounding circumstances, and where the witness admits he was mistaken on a matter he had testified to at least six times at the trial?

Court's inference: Yes.

ASSIGNMENT OF ERRORS

(1) The court erred in making Findings of Fact X in that the evidence does not support the Finding.

(2) That the court erred in entering judgment for appellee against appellant in the sum of $12,118.47.

(3) That the court erred in denying appellant's motion for new trial.

(4) That the court erred in making Conclusion of Law II in excess of $9,639.53.

ARGUMENT

The Boiler Revision Was Part of Appellee's Sub-contract and Not an Extra.

It is appellant's position that the boiler revision and change of plans were made prior to the execution of the sub-contract between appellant and appellee; that it was known to be an item in effect under the government's contract prior to the execution of the sub-contract between appellant and appellee; that the work and materials required by the revision was provided for by an independent contract prior to the execution of the sub-contract between appellant and appellee and in force at all times during the life of the sub-contract; that the work and materials claimed on were not furnished by appellee; but that prior to the execution of the sub-contract between appellant and appellee, the appellee did relieve itself of this work by agreeing that a fixed sum could be deducted from its contract price.

On direct examination the president of the appellee testified in answer to a question as to when he was given the plans and specifications for the revision as follows:

> Mr. Lycette: "Q. When was that given to you, do you recall?
>
> A. Well it was probably given to us along with that request from Colonel Antonovich—I would judge about the same time, about April 26th, along with the plans.

Q. Now were you given a copy or shown a copy of the revised plans which have been introduced in evidence in this case?

THE COURT: The blue prints?

Q. The blue prints?

A. Yes."

Tr. 125

On cross examination Mr. Rushlight testified:

MR. PETERSON: "Q. So then this boiler you ordered from Early is the boiler under your revisions?

A. They are the boilers called for in the substitute specifications and also included in the revision.

Q. And now then, these boilers that you ordered on the 6th of May were used in this project?

A. Yes, sir."

Tr. 150, 151

Again Mr. Rushlight on cross examination testified:

"Q. Then on April—on May 6th, did you not go with Mr. Anderson to Fort Lewis and wasn't that revision approved by the government?

A. We were at Fort Lewis several times.

Q. No, just May 6th.

A. Well I couldn't say we were there on May 6th, because I don't remember. You have a letter —will you show me that letter that governs the date of the approval. I think that fixes the date. I don't remember these dates.

MR. PETERSON: That is fair enough, let's get that. Mr. Lycette, could you help me a minute to find that letter from Fort Lewis, I think on May the 15th.

MR. EVENSON: It is Exhibit 6.

Q. All right, referring you to plaintiff's exhibit 6 from Antonovich, which confirms the acceptance of that—

A. Yes, this letter is dated May the 14th and has reference to a verbal acceptance made on May the 6th.

Q. With directions to proceed with the work?

A. I don't know anything about that verbal acceptance on the part of Antonovich. I do know, however, at times Mr. Anderson and I were talking to the government about this; that they assured us that this change would be made."

Tr. 145, 146

On rebuttal Mr. Rushlight testified:

"Q. Mr. Rushlight, you went with Mr. Anderson on May 6th out to Fort Lewis to see the construction quartermaster at the time he was advised that the powerhouse would be according to the substitute plans and specifications, did you?

A. Right close to that date. I believe that date might be the date we went out there, yes."

Tr. 384

It is clear from the admissions made by the president of appellee that prior to the execution of the subcontract on May 15th the appellee knew of the boiler revision and that it would be required.

The conduct of appellee prior to the execution of the contract also conclusively shows that it was contemplated that the revised boilers would be installed prior to the making of the sub-contract.

Mr. Charles Wyatt, a disinterested witness, testified to a transaction with Mr. Rushlight relating to the purchase of the revised boilers.

"Q. Showing you, Mr. Wyatt, plaintiff's exhibit 17, I will ask you—that is in three pieces—will you explain to the court what this is?

A. This first slip of paper is—you want the circumstances surrounding it?

Q. Yes.

A. Well, briefly, that is, Mr. Rushlight called me on the telephone on the 6th of May.

Q. Of what year?

A. Of 1941, and said that he either was or had been at Fort Lewis and that the alternate, which is the revision—you refer to as the revision, had been accepted and for me to wire the order into the Erie City Iron Works. I told him that I couldn't wire them in without some sort of a written order, and he told me that if I would come up to the Winthrop Hotel that would be taken care of.

Q. At the Winthrop Hotel in Tacoma?

A. In Tacoma.

Q. Did you go up there?

A. I went up there.

Q. All right then, will you tell the court under what circumstances that order was given you?

A. Well I went up to the Winthrop Hotel and he simply wrote this piece of paper out and at the same time calling Mr. Anderson on the tele-

> phone saying that I would be out to Mr. Anderson's house for a formal signature on the contract."
>
> Tr. 208, 209

Plaintiff's exhibit 17 referred to by the witness was written on the printed stationery of the Winthrop Hotel, was signed by appellee and authorized appellant to enter into a contract to purchase the revised boilers and have them erected for the sum of $16,924.00, which sum was to be charged to appellee's account. Relying on the written order and the telephone conversation testified to by the witness Wyatt, appellant did enter into a contract with Wyatt's principal to purchase said revised boilers.

> "* * * * completely delivered and erected on foundations to be furnished by the purchaser * * * *."

Plaintiff's Exhibit 17 is in itself a complete contract to purchase the revised boilers installed at Fort Lewis and authorizing the deduction of the purchase price from appellee's contract.

Three days after appellee executed the authorization to purchase the revised boilers, which was also three days after the change had been made, it submitted its written bid to appellant. This bid was for the sum of $293,000.00. This bid on its face, bore the word "Revised" which was the term used throughout, referring to the change. (Deft's Ex. 3.)

So that there can be no question as to when the revision of plans took place, the construction quartermaster, Colonel Antonovich, called as a witness for appellee and the man who let the contract and who made the change, testified to the date.

> Mr. Peterson: "Q. * * * * Colonel, do you recall the approval of these revisions for the boilerhouse were approved on May 6th, at the time that the main contract was approved?
>
> A. I think that is correct.
>
> Q. That is correct. Showing you Plaintiff's Exhibit 6, that is your letter, Colonel?
>
> A. Yes, this is my letter.
>
> Q. And that shows that you orally approved of the revision on May 6th?
>
> A. That is correct."
>
> Tr. 265, 266

And the same witness thereafter testified:

> "Q. But he was authorized to proceed as under May 6th?
>
> A. That is right. That letter of authority is, in substance has the value of a contract.
>
> Q. Yes, that is all right, and when the authority given, that is you say, the contract?
>
> A. Yes."
>
> Tr. 267

The sub-contract itself bears the date of May 15, 1941, and it is nowhere contended that it was executed prior to that date. (Plaintiff's Ex. 17.)

It clearly appears therefore that the revision was made prior to the execution of the sub-contract, that all parties were fully advised of the revision, and that appellee had agreed, in writing, that the cost of the revised boilers should be deducted from his contract.

The appellee also admitted that its contract with appellant required it to perform all the plumbing and heating work.

In answer to an inquiry by the District Judge, Mr. Rushlight testified:

> "THE COURT: "And upon that issue you claim your contract did not require you to do that?
>
> A. Your Honor, our contract in standard opinion requires us to do *all* the plumbing and heating, and hot air heating, but it does not call for us to do any wiring."
>
> Tr. 142

The change in the type of boilers was continually referred to as the "revision." The plans on which this change was shown were referred to as the "revised" plans, Pl's Ex. 3, Tr. 59, Pl's Ex. 4 (2d letter), Tr. 130. With full knowledge of this fact, appellee placed the word "Revised" on its written proposal to appellant on May 9th. Tr. 167, Pl's Ex. 8.

There is also another matter which took place just prior to the making of this contract which would

strongly argue that it was intended that the contract price was to include the boiler revisions. On May 6, 1941, the day on which appellant testified the price of $293,000.00 was agreed upon for the plumbing and heating work, including the revisions, and the day that appellee authorized the purchase of the revised boilers from Wyatt the appellant had a bid of $286,000.00 from another plumbing and heating subcontractor, and the actual cost to appellee for its portion of the revised work was not in excess of $7000.00, or a total of $293,-000.00. Def's Ex. A-28, Tr. 274, 275, 245.

The appellee also admitted that it agreed with appellant that he could deduct the cost of the revised boilers from its contract price. Tr. 154.

It is uncontradicted that the revised boilers were installed by the Roy T. Early Co. in accordance with its contract with appellant. Tr. 253, 151.

The appellee is now asking for and the District Court allowed an extra for an item which had been changed prior to the making of the subcontract; that was known to the parties to the subcontract; and which the appellee had agreed could be deducted from the subcontract price.

It is the universal rule that extras on a building

contract will not be allowed where it is shown that the work involved was contemplated by the parties at the time the contract was made. The corollary is more often stated; that an extra will be allowed if it is shown that the item was not within the contemplation of the parties.

The contract in question was executed in Washington and the law of Washington would normally govern. However, there does not appear to be any real division of authority on this matter so we will refer to the pertinent decisions in Washington and also those of other jurisdictions as well.

In *Black v. Miller Co.,* 169 W. 409, 14 Pac. (2d) 11; which was an action by a contractor for extras in remodeling a hotel, the Supreme Court of Washington said:

> "Under these conditions the general guiding principle to be followed is: what was within the contemplation of the parties when the contract was signed? Manifestly, it was intended that a four story building, containing 156 guest rooms, should eventuate, fit for occupancy as a modern hotel. Everything essential to producing that result must be held to come under that contract; but those things not specified when the contract was made, which tend to mere beauty or adornment, to display, to ultra convenience or even intrinsic value and life of the building, if not within the contemplation of the parties at the time of entering into

the contract, if ordered by the owner or accepted with full knowledge, must be allowed as extras."

In *Maryland Casualty Co. v. City of Seattle,* 9 W. (2d) 666, 116 Pac. (2d) 280; the Washington court in a subsequent decision to *Black v. Miller Co., supra,* stated its position with regard to additional compensation on construction contracts, as follows:

> "Rather, we think, the present case comes within a familiar principle of contract law which is succinctly stated in the italicized portion of the following quotation from Judge Brandeis' opinion in *United States v. Spearin,* 248 U.S. 132, 136, 39 S. Ct. 59, 61, 63 L. Ed. 166;
>
> > 'Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforseen difficulties are encountered.' "

In *Russo et al v. Charles I. Hosmer, Inc.* (Mass.) 44 N.E. (2d) 641; which was an action by a sub-contractor against the general contractor for an alleged extra, where the extra had been allowed the general contractor by the State of Massachusetts for some work covered by the sub-contract, the Massachusetts court said:

> "The removal and stacking of the old rails was included in the contract and was not an extra. Payment for doing this work was included in the unit prices that were to be paid for erecting the new

highway ground rails. The fact that the contract between Hosmer and the Commonwealth was amended by permitting Hosmer to charge and receive $1,148.40 for this item does not permit Russo to collect this amount from Hosmer. This money was not paid to and received by Hosmer for the benefit of Russo. Russo's compensation was fixed by the contract between them, which was never modified, and Russo was not to have any additional compensation for the item in question."

In *Cyr v. Essen Packing Co., Inc.,* 195 N.E. 95; the question was whether certain water piping installed during the performance of a written contract was required by the contract or constituted an extra. The contract and specifications required the furnishing and installation of certain plumbing fixtures but did not expressly require the installation of hot and cold water piping to make the fixtures usable. The court held that the water piping was required and did not entitle the contractor to an extra.

In *Bowman v. Maryland Casualty Co.,* 263 Pac. 826 on 831 the California court said:

"Whether or not the contractor is entitled to an extra depends upon whether or not the work and material claimed as an extra is included in the contract and specifications."

In *Phoenix Bridge Company v. United States,* 211 U.S. 188, 29 S. Ct. 81, 59 L. Ed. 141; it was held that the erection of a temporary liftspan following an acci-

dent was within the contemplation of the parties and the contractor was not entitled to extra compensation.

The rule on construction of building contracts is well stated in *Merrill-Ruckgaber Company v. United States,* 241 U.S. 387, 36 S. Ct. 662, 60 L. Ed. 1058; as follows:

> "The case is in narrow compass. It involves for its solution the construction of a contract, and the rules to guide such construction we need not rehearse. To its words we at first resort, but not to one or a few of them, but to all of them as associated, and as well to the conditions to which they were addressed and intended to provide for."

The rule as to when the courts will imply a promise to pay for an extra is stated in *Hawkins v. United States,* 96 U.S. 689, 24 L. Ed. 607:

> "Express stipulations cannot in general be set aside or varied by implied promises; or, in other words, a promise is not implied where there is an express written contract, unless the express contract has been rescinded or abandoned, or has been varied by the consent of the parties. Hence the rule is, that, if there be an express written contract between the parties, the plaintiff, in an action to recover for work and labor done, or for money paid, must declare upon the written agreement so long as the special agreement remains in force and unrescinded, as he cannot recover under such circumstances upon a *quantum meruit.*"

In *Fore River Shipbuilding Co. v. Southern Pacific Co.,* 219 F. 387; the majority of the First Circuit Court of Appeals held that the law will not imply a contract where there was a contract and the work was done under that contract. ,

So, in the case at bar, since the three low pressure boilers had been eliminated and the two high pressure boilers substituted prior in time to the making of the sub-contract, and was known to both parties; and was to be performed by a third party for a lump sum to be deducted from appellee's price; it must be held that a sub-contract including this work made after the change was known to all the parties would include the revised boilers. Consequently appellee is not entitled to the extra allowed by the District court in the sum of $12,118.47.

Claims for Extras Must Be Made Within One Week

The contract provides:

Sec. 5. "The sub-contractor agrees—

(b) To make all claims for extras of every kind and nature in writing within one week from the date that said claimed extra is incurred." Pl's. Ex. 7.

The appellee made no attempt to comply with this provision. Instead it submitted an agreement to appellant for his signature which appellant refused to sign. This agreement however, was not submitted within the one week period. Deft's Ex. A-3 Tr 156, 157.

The record is bare of any suggestion of waiver of this condition. Since waiver must be affirmatively shown it can be assumed that no waiver in fact occurred.

Under these circumstances it is appellant's position that the appellee is barred from the recovery of the alleged extra in the sum of $12,118.47.

The claimed extra was the result of a change made on May 6, and the liability for the extra, if it was extra, would have been incurred at the latest on May 15th which was the date the contract was signed. Pltf's Ex. 7.

That would particularly be true in this case as appellee had in fact incurred the expense on May 6 by

execution of the agreement relative to the purchase of the revised boilers. Pltf's Ex. 17.

The latest date therefore for the filing of such a claim in writing was May 22d.

While many decisions deal with provisions of building contracts requiring orders for extras to be in writing, and others of a similar nature, there are few on the exact point.

The rule however is stated in "The Law of Public Contracts" by Donnelly ss 240, as follows:

> "Any limitation upon the time within which or the manner in which claims for extra work shall be presented or claimed must be complied with before recovery is allowed, as these are generally held to be conditions precedent to recovery."

In *O'Keefe v. Corporation of St. Francis' Church,* 22 A 325, 327, the Connecticut court, in speaking of such a provision said:

> "Unless waived, this provision remains a valid portion of the contract, absolutely binding upon the parties, however harsh it may appear to be. Such provisions are not inserted in contracts for naught and are not to be disregarded."

In *Abercrombie et al v. Wondiner,* 28 So. 491, 496; the Alabama Court, speaking of a like provision in a construction contract, said:

"The making of the claim in the manner stipulated, was a condition precedent to the right of plaintiffs to claim compensation, and as there is nothing in such a condition offensive to public policy, it only remains for the courts to give it force and effect. Under this clause the defendant had the right to know as the work progressed, how much the extra work would cost him, and this right existed whether the work was at his instance or voluntarily done by plaintiffs or otherwise."

In *Burnham v. City of Milwaukee,* 75 N.W. 1014, 1020; in referring to a provision for extras in a construction contract, the Wisconsin Court said:

"The obligations and duties of contracting parties toward each other cannot be brushed aside so lightly. The terms and conditions of the contract must be substantially complied with, or some legal excuse shown for not complying with them, before an action thereon can be sustained."

In *Capital City Brick & Pipe Co. v. City of Des Moines*, 113 N.W. 835, 840; the Court said:

"It was entirely competent for the parties in making their contract to hedge the possibility of claims for extra compensation with all such reasonable restrictions as they might devise or agree upon."

There being no compliance with the provision of the contract requiring the submission of a claim within one week and such a provision being lawful and voluntarily entered into by the parties the item of alleged extra should have been denied by the District Court.

The Evidence Does Not Support Finding of Fact X

The item in question was set up in appellee's complaint as an extra. It is too well settled to require citation of authority that one who claims an extra has the burden of proving it. There was a direct conflict in the evidence on practically all the findings incorporated in Finding of Fact X. The court found that appellee had sustained the burden of proof relying primarily upon the testimony of Mr. Rushlight, president of appellee.

Let us examine in part Mr. Rushlight's testimony to ascertain whether it is sufficient to sustain the burden of proof.

Rushlight testified on many occasions at the trial that he had never met appellant before the bidding on this job. Tr. 116, 170, 174, 175.

Subsequently the court asked Mr. Rushlight the following question:

> "*The Court*: You did not understand. The Court is asking you whether you were well acquainted, but before, didn't you understand very distinctly whether you had even known this man before?
>
> A. Yes, sir. I was in error and the only thing I could do, since my memory is refreshed by these specific cases, is to say to you I was in error—* *" Tr. 422.

Mr. Rushlight testified he submitted a written bid to appellant for $300,000.00. Subsequently he testfiied he did not know whether it was in writing. He also testified he ran off mimeographed copies of these bids but he was never able to produce a copy of this bid for $300,000.00. Tr. 117, 161, 163, 177, 179, 180.

Mr. Rushlight testifiied he wrote the word "revised" on his bid of May 9th to indicate revision in price from his bid of $300,000.00. If there was no bid of $300,-000.00, then this explanation must also fail. Tr. 167.

The record is full of similar glaring inconsistencies in the testimony of Mr. Rushlight and the trial court commented on it as follows:

> "Now if the court cannot depend upon your veracity, why of course it is going to change the situation, and this is the reason I have required this further hearing, because someone, whether intentionally or otherwise, has testified to facts that are not the truth, and of course you admit now on the matter of acquaintanceship * *" Tr. 421, 422.

We submit that the District Court was not justified in relying upon the testimony of Mr. Rushlight alone when contradicted by direct evidence to the contrary and the admitted circumstances surrounding the transaction and we further submit that this testimony produced by the appellee was not sufficient to sustain the burden of proof imposed upon it.

CONCLUSION

In conclusion, courts have at all times adopted a policy of scrutinizing claims for extras on building contracts with great care. That rule should not be relaxed as it would undoubtedly lead to endless litigation. Unless the rule is to be relaxed this court should reverse the trial court on the item appealed from on any or all of the grounds mentioned.

Respectfully submitted,

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